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In the Supreme Court of the United States

OCTOBER TERM, 1976

SUMTER PLYWOOD CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 535 F. 2d 917. The decision and order of the National Labor Relations Board (R. 200-201[1]) are reported at 215 NLRB No. 56. The Board's decision in the related representation case is set forth at Pet. App. A37-A40 and A41-A50.

JURISDICTION

The judgment of the court of appeals (Pet. App. A35) was entered on August 16, 1976, and a timely petition for rehearing was denied on October 6, 1976 (Pet. App. A36). The petition for a writ of certiorari was filed on November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"R." refers to the record in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

QUESTION PRESENTED

Whether the Board properly concluded that petitioner had not established that statements made by union agents during a representation election campaign warranted setting aside the election, where such statements were not inflammatory and were relevant to the economic issues in the campaign.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended, 61 Stat. 140-141, 73 Stat. 525, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. The Regional Director of the National Labor Relations Board conducted an election among the production and maintenance employees at the Livingston, Alabama, plant of petitioner (the Company) (Pet. App. A41-A42). The Union[2] won the election by a vote of 156 to 77 (*ibid.*). The Company objected to the election on the ground, *inter alia*, that the Union had introduced irrelevant racial propaganda into the campaign. The Board rejected the Company's objections and certified the Union as the bargaining agent (Pet. App. A37-A50).

[2]The Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

The Company then refused to bargain with the Union and, in the subsequent unfair labor practice proceeding, reiterated its objections to the election. The Board ordered a hearing before an administrative law judge with respect to several objections not at issue here. Thereafter the Board accepted the judge's recommendations and found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (R. 193-195). The Board entered an appropriate remedial order.

2. The Company proffered evidence that was accepted *arguendo* by the Board, which did not hold an evidentiary hearing concerning the racial issue. The Company offered to prove that the Union circulated to all employees—204 out of 241 of whom were black—an 11-page booklet of cartoons and text on the benefits of union organization. One cartoon pictured a number of obstacles in the road to organization, including a row of hurdles labelled "Uncle Tom," "Petting," and "Sweet." Another cartoon showed a black man being kicked out of a "Welfare Office" (R. 107-115). The remaining cartoons presented traditional union arguments about the benefits of organization.[3] See Pet. App. A20-A24 and n. 14.

The Company offered to prove that at two of the Union's organizing meetings a black politician who was running for local office spoke to an all-black audience; he told them that "black people should stick together" and urged them to register to vote in the coming election (Pet. App.

[3]These included some biblical excerpts; a picture of clasped hands over the message that a union contract means security; an exhortation to resist the Company's possible resort to threats; a reminder that only a union could protect employees against arbitrary layoffs; an explanation of the virtues of seniority; a cartoon showing a shabbily-dressed individual, who says, "I had a chance to *Vote Yes*"; and a final appeal to "Remember It is Your Life" (R. 109-115).

A47). At one meeting Sylvester Hicks, a union organizer, stated, in response to a black employee's complaint about the paucity of black secretaries and supervisors in the plant, that blacks had been enslaved for 100 years but that the Union could help (*id.* at A22). At another meeting Hicks said "something about black people being behind for a long time" (*ibid.*). In addition, one black employee alleged that she had been called a "white mouth" by one of the Union's representatives after she indicated that she would not support the Union (*ibid.*; R. 125).

The Company also presented evidence that "black power" bumper stickers appeared on some employees' cars shortly before the election, and that employees on occasion would exchange a clenched fist salute. The black employees in one department developed a pro-union cheer (which included this "black power" salute) a few days before the election (Pet. App. A47-A48). Finally, on two occasions pro-union black employees urged other black employees to support the Union as a matter of black pride.[4]

3. The Board concluded that these allegations, even if true, would "not warrant a finding that the election was conducted in an atmosphere of irrelevant appeals to racial prejudice calculated to inflame the employees so that they would vote for the Union on racial grounds alone" (Pet. App. A49). The Board explained (*id.* at A48-A49):

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[4]When one employee explained to a union supporter that she had not attended a union meeting because she had not thought it necessary, the union supporter responded: "that is the reason black people had not gotten any further than they had—because they would not pull together" (Pet. App. A23 n. 13). Another union supporter, in explaining the welfare office cartoon in the Union's campaign pamphlet, stated "that was the way the white had treated the black man for over 100 years" (*ibid.*; R. 121-122).

> [T]he evidence considered as a whole does not reveal the kind of appeals to racial prejudice, on matters unrelated to the election issues, which make it impossible for employees to exercise the franchise in a sober and informed manner. The [Company] presented no evidence of overt appeals to racial prejudice that would tend to engender racial hatred. An overwhelming majority of the employees in the unit were black; the [Union] directed its campaign primarily toward these employees; and because of the general election in which white and black candidates were opposing each other, race was an issue in Sumter County in November, 1972. Certainly, many of the employees were interested in their status as black individuals. It appears from the evidence that [the Union] raised the issue of race in an effort to show that it could bring economic benefits to Negro workers rather than in an effort to inflame racial hatred with irrelevant and unrelated matters. Under such circumstances the Board has found that introduction of the racial issue into a campaign does not warrant setting aside an election.[5]

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[5]The Board contrasted the facts here with the situation in *Sewell Manufacturing Co.*, 138 NLRB 66. There, the employer had charged the union with "race-mixing" and had circulated to the employees photographs of interracial dancing by persons identified as union leaders. 138 NLRB at 72. The Board found that such material was not germane to the election issues and was calculated to "exacerbate racial prejudice," and that it "so lowered [permissible election] standards that the uninhibited desires of the employees could not be determined in the election" (*ibid.*). The Board ruled that henceforth "appeals to racial prejudice on matters unrelated to the election issues or to the union's activities" would afford a basis for setting aside an election (*id.* at 71). The Board added that "the burden will be on the party making use of a racial message to establish that it was truthful and germane" (*id.* at 72). In the present case the Board found that the race-related speech was pertinent to the campaign issues and was not inflammatory.

4. The court of appeals enforced the Board's order. It found that here, as in *National Labor Relations Board* v. *Bancroft Manufacturing Co., Inc.*, 516 F. 2d 436 (C.A. 5), certiorari denied, 424 U.S. 914, which presented a similar situation, "racial considerations did not form the 'core or theme' of the Union's campaign, and that the racial messages authored by the Union were not 'inflammatory'" (Pet. App. A23). The court explained (Pet. App. A23-A25; footnotes omitted):

> The bulk of the campaign literature consisted of color-blind unionist appeals. The challenged cartoons are patently inoffensive. The term "Uncle Tom" certainly connotes some racial message, but it also connotes an economic one—the desire for a break with the tradition of economic dependency. As to the objection regarding the black male being booted from the welfare office, we can only note that the era of the invisibility of blacks in illustrative media has passed. The Company's assumption that a white figure would evince no racial message, whereas a black figure constitutes an appeal to racial hatred, is an assumption grounded in a past all too recent, but nonetheless past. Downtrodden workers are ubiquitous in Union organizing propaganda, and in choosing a color for the illustrations here, we cannot expect the Union to have been unmindful that the electorate was almost 85% black.
>
> Nothing in the record indicates that the local politician's exhortation that "black people should stick together" was anything other than an appeal for the employees votes for him in the general election. Hicks' statements to the all black audiences represented an attempt to equate black economic betterment with unionism, but could not be construed as an effort to set blacks against whites or to suggest that blacks were entitled to greater rights than whites.

> The black power salutes and bumper stickers indicate only that supporters of the Union identified betterment of the conditions of blacks with a victory of the Union in the election. They do not indicate that the Union campaign was grounded on a black versus white emotionalism. The "white mouth" comment and the few other random incidents with racial overtones suggest perhaps that some supporters of the Union attempted to capitalize on black resentment against previous oppression by associating anti-unionism with that white oppression. Even under searching scrutiny, however, these few alleged incidents in the context of the entire organizing campaign cannot be seen to rise from *de minimis* to "central" or "inflammatory" stature.

ARGUMENT

The basic question presented is whether the Board properly concluded that the racial comments in the election campaign in the present case did not preclude the employees from making a free choice to accept or reject the Union. This issue, which turns largely on an evaluation of the facts, does not warrant review by this Court. There is no conflict among the circuits on any question presented here. Moreover, the Board's conclusion is justified because the racial comments were not inflammatory and were germane to the economic issues in the campaign.

Petitioner's contention that the court of appeals applied an "impermissible double standard," which sanctions "consciousness-raising" addressed to black employees while prohibiting the identical conduct addressed to whites (Pet. 8-9), misunderstands the nature of the issues the court of appeals was called upon to resolve. The court did not draw a distinction based on race. It merely observed that, in the case of "ethnic groups which have historically been economically disadvantaged"—whether they be black or white—"the call to ethnic pride and unity

has a strong claim to congruence with the Union's traditional call to economic betterment" (Pet. App. A28). A reference to race that might in some contexts be irrelevant rabble-rousing might in other contexts convey the important message that by sticking together minority groups can lift themselves toward the level of more advantaged groups. No similar message is likely to be conveyed by "appeals to the 'ethnic pride of historically advantaged groups" (*ibid.*).[6]

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[6]There is likewise nothing to petitioner's further contention (Pet. 13-14) that the decision of the court below was based on an "irrational consideration" insofar as it took account of the Union's 79-vote margin of victory (Pet. App. A28). Since the court had already concluded that there was, at most, a minimal infusion of improper racial material in the election campaign (Pet. App. A25), it was not unreasonable to point out the improbability that the objectionable material had swayed the votes of 40 employees.

Finally, petitioner's argument (Pet. 15) that the opinion of the court of appeals is unconstitutionally vague is unpersuasive. A judicial opinion need not be drafted with the precision of a criminal statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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